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IN THE

# Supreme Court of the United States

NATIONAL CASUALTY COMPANY,

*Petitioner,*

—v.—

LOCKHEED MARTIN CORPORATION,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## AMERICAN INSTITUTE OF MARINE UNDERWRITERS' BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

The American Institute of Marine Underwriters ("AIMU") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by National Casualty Company ("National Casualty").

## INTEREST OF *AMICUS CURIAE*[1]

AIMU is a non-profit trade association representing the ocean marine insurance industry in the United States as an advocate, source of information and center for education. (*see* www.aimu.org). AIMU represents 49 marine insurance companies in the United States. Those companies underwrite the vast majority of the ocean marine risks insured in the United States.

The risks insured by AIMU's members include physical damage to vessels under hull and machinery insurance policies, such as the insurance policy at issue in this case. In 2006, AIMU's members underwrote marine insurance policies

[1] Pursuant to Supreme Court Rule 37.6. *amicus curiae* declares that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief at least 10 days prior to the due date.

with collective total premiums of approximately $2.5 billion.

AIMU works in conjunction with the United States government and international groups to monitor and ameliorate the legal environment for the marine insurance industry and the broader maritime industry generally. AIMU is the forum for action on the important and timely issues that affect United States marine insurers, reinsurers and the maritime community at large.

This brief focuses on the key issue presented in the petition for a writ of certiorari: whether an insured can nullify a marine insurer's right to have a dispute under a marine insurance policy heard by a federal judge under the federal courts' admiralty jurisdiction. The resolution of this question is of major significance to all participants in maritime commerce, not just marine insurers.

Those insurers (the members of AIMU), however, provide critical support for the maritime industry; without the insurance underwritten by AIMU's members, vessel owners, shippers of cargoes and other participants in the maritime industry would simply be unable to operate. AIMU supports National Casualty's petition for a writ of certiorari because the resolution of this case will directly and significantly impact AIMU's members. The Court has the opportunity in this case to resolve a conflict among the Circuits and to clarify whether, upon the election by a plaintiff to invoke the federal courts' admiralty jurisdiction and its procedures, all related claims by a defendant must be tried to the court, without a jury.

Uniformity and consistency in maritime law has traditionally been achieved via bench trials conducted by federal judges who are knowledgeable in the subject area of maritime law. Having lay juries deciding marine insurance issues at the election of a defendant threatens to erode the uniformity that results from resolution through federal bench trials in maritime cases.

AIMU therefore has a keen interest in the resolution by this Court of the essential issue in this case, and AIMU urges the Court to grant National Casualty's petition.

## STATEMENT

The underlying facts are set forth in National Casualty's petition and are therefore only briefly summarized here. In July 2001, the M/V SEA SLICE, a vessel owned by respondent Lockheed Martin, sustained damage approximately 130 miles from Honolulu, Hawaii while enroute to Anchorage, Alaska. Following an investigation, National Casualty determined that there was probable coverage under their policy and National Casualty paid the reasonable cost of repairs as required by the policy. Lockheed Martin objected to the amount of the payment and demanded an additional payment. The parties were unable to agree on the extent of the covered loss, and National Casualty therefore filed a complaint for a declaratory judgment in the United States District Court for the District of Maryland, invoking the court's admiralty jurisdiction.

Following the filing of an amended complaint by National Casualty, Lockheed Martin filed an

answer in which it admitted that both diversity jurisdiction and admiralty and maritime jurisdiction existed, but Lockheed Martin also counterclaimed, demanding a trial by jury.

National Casualty subsequently filed a motion to strike Lockheed Martin's demand for a jury trial, and the District Court granted that motion. Lockheed Martin responded by filing a petition for writ of mandamus with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit granted the petition for writ of mandamus and directed "the district court on remand to try the case before a jury." *In re Lockheed Martin Corp.*, 503 F.3d 351, 360 (4th Cir. 2007).

While the Fourth Circuit held that the Seventh Amendment "applies only to cases *at law*, a category that does not include *maritime* cases," and that "the Seventh Amendment creates no constitutional right to a jury trial of maritime claims," *Id.* at 354, (citing *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847) and *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963) (emphasis by the court)), it nonetheless concluded that Lockheed Martin was entitled to a jury trial, "even if no counterclaims had been filed." *Lockheed Martin Corp.*, 503 F.3d at 358.

On October 23, 2007, National Casualty's petition for rehearing en banc or for panel rehearing was denied. National Casualty's petition for a writ of certiorari followed.

## ARGUMENT

The Fourth Circuit's decision is in conflict with decisions of several other circuits that have held that defendants have no right to a jury trial in admiralty. *See, e.g., Complaint of Consolidation Coal Co.*, 123 F.3d 126, 134 (3rd Cir. 1997), *cert. denied*, 532 U.S. 1054 (1998) (case in the district court was entirely an admiralty case which did not include a right to trial by jury); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 958, 986 (5th Cir. 1978) (plaintiff may preclude a defendant from invoking the right to a trial by jury by electing to proceed under Rule 9(h)); *T.N.T. Marine Service, Inc. Weaver Shipyards & Dry Docks, Inc.* 702 F.2d 585, 587-88 (5th Cir. 1983), *cert. denied*, 464 U.S. 847 (1983) (where a complaint contains a statement which identifies a claim as an admiralty or maritime claim, there is no right to a jury trial, even though diversity jurisdiction may exist). *But see Lockheed Martin Corp.*, 503 F.3d at 360 (insurer's declaratory judgment action identified as a non-jury admiralty claim did not affect insured's right to a jury trial on a breach of contract counterclaim); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995) (jury may decide all issues in a case involving both admiralty and law claims); *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1042 (8th Cir. 1983) ("Although there is no constitutional right to a jury trial in an admiralty case, neither is there a prohibition against jury trials in admiralty cases. Neither the seventh amendment, nor any statute of rule of procedure forbids jury trials."); *Wilmington Trust v. U.S. District Court for the Dis-*

*trict Court of Hawaii*, 934 F.2d 1026, 1031 (9th Cir. 1991), *cert. denied* 503 U.S. 966 (1992) ("Regardless of whether a claim is cognizable in admiralty, the right to a jury trial on such claim is preserved despite plaintiff's election to proceed in admiralty."). This has resulted in a significant erosion of the clarity and predictability that the members of AIMU depend on in providing insurance that is vital to maritime commerce. It is critical to the members of AIMU that the Court resolve this conflict.

## The Decision Below Will Result In Uncertainty As To Awards of Damages In The Maritime Context And Consequent Undue Burdens On Marine Insurers And Their Insureds.

The potential for juries to erode the uniformity and consistency of awards rendered in cases involving marine insurance imposes a considerable burden of uncertainty on the maritime industry and its insurers. From the perspective of AIMU's members, the potential consequence of the Fourth Circuit's decision is that marine insurers will be unable to establish accurate loss estimates, and they will therefore be compelled to increase premiums. These increased premiums will be passed on to insureds and, in turn, to the insureds' customers. This would have a significant adverse effect on maritime commerce.

The marine insurance industry relies on effective risk management and assessment in order to set premiums and terms of coverage. *See e.g., Bender Shipbuilding & Repair Co. v. Brasiliero*,

874 F.2d 1551, 1557 (11th Cir. 1989) ("An insurance policy, regardless of its subject matter, is a contract between the insured and the insurer for coverage of risks. The insurer makes an assessment of the risks facing the insured, sets premiums consistent with the risks covered and supplies a written statement of coverage."). Although waterborne commerce entails risks, these risks can be managed when they are predictable. In the areas of maritime law and marine insurance, predictability and uniformity have traditionally been achieved by having cases heard by federal judges, who have unique experience in this area of law. *Larson v. Insurance Co. of North America,* 252 F. Supp. 458, 467 (W.D. Wash. 1965), *aff'd,* 362 F.2d 261 (9th Cir. 1966) (quoting 44 C.J.S. *Insurance* § 289, pp. 1136-1138, n. 11); *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 278 F. 770 (S.D.N.Y. 1922), *aff'd,* 282 F. 976 (2d Cir. 1922), *aff'd,* 263 U.S. 487 (1924) ("The interpretation of a marine insurance policy is not a question of morals or of public policy, and the important thing is to secure uniformity of an interpretation in a commercial world embracing more than one continent and more than one ocean."). Permitting juries in some jurisdictions (but not others) to decide issues of marine insurance threatens to upset the uniformity that is vital to maritime commerce and its insurers, and to impede marine insurers from accurately and effectively engaging in risk management. *Cf. Markman v. Westview Instruments*, 517 U.S. 370, 388 (1996) (holding in a patent case that "[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors

unburdened by training in exegesis") The *Markman* court went on to note that "[u]niformity would, however, be ill served by submitting issues of document construction to juries." *Id.* at 391.

The Court below has ignored fundamental objectives of federal maritime law: uniformity, predictability and avoidance of undue burdens on maritime commerce. Federal maritime law, which governs issues arising under marine insurance policies, provides limited liability for shipowners and fair and reasonable compensation for maritime claims, while promoting settlement and judicial economy. *See, e.g., Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983) ("In sum, comparative fault has long been the accepted risk-allocating principle under the maritime law, a conceptual body whose cardinal mark is uniformity. These values of uniformity, with their companion quality of predictability, a prized value in the extensive underwriting of marine risks, are best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit."); *In re M.V. Floreana*, 37 F. Supp. 2d 853, 854 (S.D. Tex. 1999) ("Forgetting that maritime limitation of liability is a principle of American law that parallels international law leads to idiosyncratic judgments that undermine the predictability and reciprocity of American maritime law."). Each of these goals may be undermined by the submission of maritime claims to juries, who are generally unfamiliar with marine insurance policies and the law governing those policies. Lay juries lack the depth of knowledge regarding marine insurance that is possessed by federal judges.

Unique concepts of marine insurance, such as *uberrimae fidei* or "utmost good faith", are well known to federal judges but not to juries.

Indeed, marine insurance is traditionally exempt from many of the rules and regulations that apply to other lines of insurance. *Acadia Ins. Co. v. McNeil*, 116 F.3d 599, 604 (1st Cir. 1997) ("Consistent with this approach, the New Hampshire Insurance Code affords idiosyncratic treatment to ocean marine insurance in various ways; for example, it eschews the usual tax on premiums via-a-vis ocean marine insurance (instead substituting a special tax on underwriting profits), places ocean marine insurance outside the New Hampshire Insurance Guaranty Association, and exempts ocean marine insurance from certain underwriting strictures and from rate regulation."); *St. Paul Ins. Co. v. Great Lakes Turnings, Ltd.*, 829 F. Supp. 982, 985 (N.D. Ill. 1993) ("The states generally exempt marine insurance from the kind of licensing and rate regulations that apply to other types of insurance."). If the Fourth Circuit's decision is allowed to stand, there is a substantial risk that juries will import the more familiar concepts from these rules and regulations into the marine insurance context. This would make the law relating to marine insurance more unpredictable, thus punishing maritime commerce rather than protecting it, expanding the potential liability of participants in the maritime industry rather than limiting it. *Jackson v. Travelers Ins. Co.*, 26 F. Supp. 2d 1153, 1162 n.13 (S.D. Iowa 1998) ("The liability of insurers is relevant because the unpredictable and extreme awards that juries

return against insurers presumably result in higher premiums for Nebraska employers. For example, in 1993, California juries awarded verdicts of $425,600,000 and $89,320,000 against insurers in bad faith cases, and in Texas a verdict was returned for $102,170,000 against an insurer that denied a $20,000 underinsured motorist claim.") (citation omitted).

In turn, efficient and effective underwriting of marine insurance becomes extremely difficult, if not impossible, when uniform and consistent results cannot be expected throughout the courts of the United States. Marine insurers have always expected that they can seek redress before a federal judge, and such judges have historically, and efficiently, set standards to resolve disputes and determine awards in cases involving marine insurance. Risks cannot be efficiently or effectively underwritten if it is unclear whether a judge or jury will address issues arising under marine insurance policies, or if this distinction depends upon which Circuit a case is filed in.

Marine insurers therefore need to know whether judges or juries will be deciding cases involving their insurance policies. Jury awards are far less predictable than awards rendered by federal judges, and the greater risk associated with unpredictable jury awards would require marine insurers to charge higher premiums, or perhaps refuse to underwrite certain coverages altogether. Thus, the decision below not only directly impacts the members of AIMU, but it will have an impact on the cost and availability of marine insurance coverages in the United

States. Those coverages are necessary for the participants in the maritime industry at large (and by their financiers), and thus the decision below, if not reversed, will have a chilling effect on maritime commerce.

The uncertainty and unpredictability that would result from the Fourth Circuit's decision further impacts AIMU's members directly, because marine insurers often utilize declaratory judgment actions in order to expeditiously determine rights and liabilities under marine insurance policies. *Windsor Mt. Joy Mut. Ins. Co. v. Johnson*, 264 F. Supp. 2d 158, 164 (D.N.J. 2003) ("An insurer's action for a judgment declaring that it need not provide coverage under a policy 'is a normal and orderly procedure.' ") (citation omitted). The availability of declaratory judgments and the efficient and predictable results obtained thereby are a significant benefit to the entire marine insurance community. *Metropolitan Property & Casualty Co. v. Bernardo*, 1998 Conn. Super. Lexis 1299 (Conn. Super. Ct. 1998) ("However, the present declaratory judgment action is a speedier and more efficient way to determine whether [the insured] was covered under the [plaintiff's] policy at the time of the accident.") (citation omitted). Interjecting jury trials into this area would only undermine the effectiveness of the federal courts in deciding these issues. And again, allowing for different rights and different triers of fact in different Circuits results in a significant uncertainty in the area of marine insurance.

The ocean marine insurance industry, like the maritime industry as a whole, requires standard

and uniform rules as to liability. The judges of the federal courts have long been effective arbiters of disputes involving marine insurance. AIMU therefore implores this Court to grant National Casualty's petition for a writ of certiorari, and to clarify federal procedure with respect to the right to a jury trial. The petition should be granted so that this Court can articulate a uniform standard that both marine insurers and maritime industry participants in general can rely on in conducting commerce. National Casualty and other maritime industry participants, including the members of AIMU, need clear, simple and rational standards in order to best serve the needs of maritime commerce.

This case provides the Court with the opportunity to provide uniformity, certainty and predictability of risk for the marine insurance industry and the maritime industry at large.

## CONCLUSION

For the foregoing reasons and as set forth in National Casualty's petition, the petition for a writ of certiorari should be granted.

Dated: February 21, 2008

Respectfully submitted,

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